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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

In re Applications of:)
)
Liberty Productions, L.P.)
)
et al.)
)
For A Construction Permit for A)
New FM Broadcast Station on)
Channel 243A at Biltmore Forest,)
North Carolina)

Docket No. 88-577

To: The Commission

PETITION FOR RECONSIDERATION AND/OR CLARIFICATION

Pursuant to 47 CFR 1.106 ^{1/}, Sutton Radiocasting Corpora-
tion ("SRC") -- licensee of WPEK (FM), Greenwood, SC ^{2/}
-- submits this Petition for Reconsideration of the Memorandum
Opinion and Order, FCC 01-129, released May 25, 2001 ("Dec-
ision"). ^{3/}

^{1/} This Petition is timely filed within 30 days of the
Public Notice of the Decision, which was released May 25, 2001.

^{2/} Formerly WCRS (FM), Greenwood, SC. On October 13, 2000,
the FCC released a Report and Order, MM Docket 99-313 (RM-9753),
granting a 1999 petition by SRC to change its community of li-
cense from Greenwood, SC to Mauldin, SC. The Form 301 applica-
tion filed on January 17, 2001 to implement that rulemaking
decision (BPH-20010117ACJ) is adversely affected by the FCC
action that is the subject of this Petition for Reconsideration.

^{3/} SRC has "standing" under Section 1.106(b)(1) of the Com-
mission's Rules inasmuch as its interests in WPEK (FM)'s pending
application (BPH-20010117ACJ) to implement a rulemaking allotment
at Mauldin, SC (MM Docket No. 99-313) "are adversely affected" by
the Decision's acceptance for filing of a November 1999 amendment
by Liberty Productions, Inc. (predecessor to Liberty Productions,
LP). It was not possible for SRC to participate in the earlier
stages of the proceeding because the FCC gave its first "notice"
of the "acceptance for filing" of the disputed amendment in last
month's Decision. See note 7, infra; see also 47 CFR 1.106(b)-
(1). Moreover, the FCC's consideration of the new facts pre-
sented by the Petition are required in the public interest. See
47 CFR 1.106(c)2).

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Summary

This Petition involves only one discrete aspect of the FCC's recent Decision granting the application of Liberty Productions, L.P. ("LP") for a new FM station "on channel 243A" at Biltmore Forest, NC. The Decision's grant of LP's 1987 application follows both (i) an FCC auction in 1999 in which LP was the high bidder among four mutually exclusive applicants and (ii) a prior hearing proceeding wherein LP's basic qualifications to be an FCC licensee were challenged by four competing applicants and adjudicated by subordinate officials of the agency.^{4/}

In pertinent part, the FCC's Decision purports to "accept for filing" and to grant a post-auction, November 10, 1999 amendment to LP's 1987 application, in which LP sought both (i) to change its site and also (ii) to upgrade its proposed facility from Channel 243A to Channel 243C3 at Biltmore Forest, NC. Petitioner has been informed by FCC staff since the release of the Decision that its pending Form 301 application to implement a rulemaking involving WPEK (FM) at Mauldin, SC (MM Docket No. 99-313) is in conflict with LP's November 1999 proposal to upgrade Channel 243A to Channel 243C3.

This Petition seeks FCC action confirming that there is no conflict because the Decision's acceptance of LP's November 1999 amendment did not include the grant of LP's requested one-step, Class C3 upgrade.

^{4/} See National Communications Industries, 5 FCC Rcd 2862, 2879 (ALJ), aff'd, 6 FCC Rcd 1978 (Rev. Bd. 1991), aff'd 7 FCC Rcd 1703 (1992) et seq.

ARGUMENT

I. FCC RULES AND PRECEDENT SUPPORT THE CONCLUSION THAT THE DECISION DID NOT ACCEPT FOR FILING LP'S REQUESTED UPGRADE TO CHANNEL 243C-3

At the time that LP filed its November 1999 amendment, it was the tentative high bidder following the FCC's September 1999 auction for the Biltmore Forest FM facility; but LP's application was at that time mutually exclusive with three other applicants and post-auction hearings were resuming on LP's basic qualifications.^{5/}

A threshold question exists under FCC rules and precedent whether LP's post-auction amendment to upgrade its proposed FM facility could be lawfully accepted for filing by the FCC when, at the time it was filed, there were still mutually exclusive applications pending and where hearings were resuming with respect to the applicant's basic qualifications to be an FCC licensee.

The Decision (at para. 1, 9) purports to accept and grant LP's 1999 amendment,^{6/} which never has been put on FCC public

^{5/} See Liberty Productions, Inc., 14 FCC Rcd 7637 (OGC 1999); see also Public Notice, DA 99-1912, at Attachment C (one of five original applicants unqualified for lack of payment).

^{6/} LPI was the high bidder for the Biltmore Forest FM facility in the FCC's September 1999 auction for Channel 243A at Biltmore Forest, NC.

notice as even "received" by the agency.^{7/} The post-auction amendment sought:

- (i) to change LP's specified transmitter site and
- (ii) to upgrade LP's proposed Biltmore Forest FM facility from Channel 243A to Channel 243C3.

The FCC's rules and its precedent support an interpretation of the Decision to the effect that the FCC intended only to accept the November 10, 1999 amendment insofar as LP sought FCC approval of its newly designated transmitter site. First, Section 73.203 of the FCC's Rules provides that, except for applications filed on a "first come, first served" basis or applications filed for the modification of existing FM stations, applications may be filed to construct FM broadcast stations only at the communities and on the channels contained in the FCC's Table of FM Allotments. Id., 47 CFR 73.203, emphasis added. When the November 10, 1999 amendment was filed by LP (and even today), the FCC's Table of FM Allotments contained only Channel 243A at Biltmore Forest, NC. See 47 CFR 73.202(b). The FCC's rules simply do not permit LP to file a post-auction amendment for one-step upgrade (from Channel 243A to Channel 243C3).^{8/}

^{7/} Until the release of the Decision, not only was there no FCC public notice given, LP's November 10, 1999 amendment was not contained in the FCC's engineering, BAPS, or CDBS databases nor was it even available in the FCC's ECFS filing retrieval system.

^{8/} While Section 73.3573(a)(1) of the Rules provides an opportunity for winning bidders of broadcast auctions to submit with their long-form applications any proposal for a "higher or lower class adjacent channel, intermediate channel or co-channel," that opportunity is available only to applications being
(continued...)

Second, a recent FCC decision lends additional support to the proffered interpretation. In Hornbrook, CA, DA 01-274, Docket No. 00-73, RM-9861, 2001 FCC Lexis 791, released February 9, 2001, the FCC held that only "first-come, first-served" applicants are entitled to file one-step upgrade applications prior to receiving a construction permit or a license. Id. at note 2. Thus, LP's premature attempt to upgrade the "Class A" FM channel on which it had bid to a "Class C3" channel -- prior to resumed hearings on the question of its basic qualifications -- was unlawful and could not be accepted under the FCC's rules and pertinent precedent.

In such circumstances, the FCC should reconsider or clarify its purported "acceptance for filing" of LP's November 10, 1999 amendment, at least insofar as LP therein sought to upgrade its proposed FM facility from Channel 243A to Channel 243C3.

II. THE DECISION APPEARS TO REFLECT THE FCC'S ACCEPTANCE AND GRANT OF ONLY LP'S PROPOSED SITE CHANGE, NOT ITS "CLASS C-3 UPGRADE" REQUEST

On its face, the Decision accepts LP's November 10, 1999 amendment but grants its application for a new "Class A" facility at Biltmore Forest -- on Channel 243A (not Channel 243C3). See Decision, supra, at para. 1, 9.

^{8/}(...continued)
processed under 47 USC 309(j) and not to mutually exclusive applications like LP's 1987 application, being processed post-auction under 47 USC 309(l)(hearing procedures).

Indeed, read as a whole, the Decision fairly appears to have accepted the disputed amendment ONLY for purposes of allowing LP's requested change of transmitter sites, not its purported request for upgrade to channel 243C3. Id., at para. 9 (accepting the November 10, 1999 amendment "specifying a new transmitter site"); see also Decision, supra, at 1, Caption ("New FM Broadcast Station On Channel 243A").

Accordingly, the FCC's Decision itself supports the reasonable interpretation that the agency did not accept or grant LP's November 10, 1999 amendment for purposes of permitting it to upgrade to a higher channel but, rather, only to approve its new transmitter site.

III. THE FCC'S JUNE 5, 2001 PUBLIC NOTICE SUPPORTS THE INTERPRETATION THAT THE DECISION ACCEPTED AND GRANTED ONLY LP'S PROPOSED SITE CHANGE, NOT ITS "CLASS C3 UPGRADE" REQUEST

The foregoing interpretation of the Decision's intent with respect to LP's 1999 amendment is virtually mandated by the facts underlying the FCC's subsequent, June 5, 2001, Public Notice.

That Public Notice directs LP to pay the final installment due pursuant to its Biltmore Forest FM auction bid by June 15, 2001, in order thereafter to be granted a CP -- a CP for Channel 243A -- not Channel 243C3. See Public Notice, DA 01-1347, released June 5, 2001. The Public Notice further states that the applications of the unsuccessful bidders will be dismissed "upon release of the Public Notice announcing the grant of a construc-

tion permit for a new FM broadcast station on channel 243A at Biltmore Forest, NC..."). Id. at 1-2, emphasis added. In addition, the Public Notice expressly refers only to LP's 1987 application ("BPH-870831MI"), without citation of any subsequent modification or one-step upgrade application, either in 1999 or at any other time. Id. at Attachment A.

In short, the FCC's June 5, 2001 Public Notice, issued less than two weeks after its Decision, underscores the FCC's intent to accept and grant only that portion of LP's 1999 amendment in which LP sought a change in its proposed transmitter site -- not the other portion of the amendment that requested a one-step channel upgrade (that is contrary to FCC rules). ^{2/}

IV. CLARIFICATION OR RECONSIDERATION IS REQUIRED IN THE PUBLIC INTEREST TO PROTECT PETITIONER SRC'S APPLICATION

Clarification or reconsideration of the Decision is warranted to protect the material interests of Petitioner. SRC's January 17, 2001 Form 301 application for WPEK (FM) (implementing the FCC's administratively final rulemaking decision in MM Docket 99-

^{2/} To the extent that one or more of the parties to the Biltmore Forest Channel 243A proceeding (MM Docket No. 88-577) seeks a stay of the FCC's June 5, 2001 Public Notice and/or the Decision, Petitioner submits that a grant of such relief might be entirely appropriate in view of the facts underlying this Petition.

313) is deemed by the staff to be presently in conflict with LP's disputed November 1999 "C3 upgrade" amendment. ^{10/}

Although SRC's January 17, 2001 application was lawfully spaced to all of the Biltmore Forest applicants' proposed Channel 243A sites, SRC properly did NOT protect that portion of LP's November 10, 1999 amendment seeking an upgrade from Channel 243A to Channel 243C3 because, in fact, there was absolutely no evidence in January 2001 that the FCC had recognized or was in any manner "protecting" that portion of LP's amendment seeking to upgrade from Channel 243A to Channel 243C3. LP's request to upgrade simply was not in the FCC's databases nor in any other database. Indeed, no public notice of the requested Class C3 upgrade ever has been given. ^{11/} And, as explained above, the "upgrade" portion of the amendment was prima facie unlawful.

Accordingly, clarification or reconsideration of the Decision is needed to protect important rights of Petitioner.

^{10/} Under Section 215 of the Rules, Petitioner's January 17, 2001 application for WPEK (FM) is fully spaced to LP's Channel 243C3 application site but is short spaced by approximately 0.95 kilometers to its Channel 243C3 allotment reference coordinates.

^{11/} See note 7, supra.

CONCLUSION

The FCC should reconsider its Decision or, at a minimum, clarify its "acceptance for filing" of LP's November 10, 1999 post-auction amendment to confirm (i) that it did NOT accept for filing or grant LP's requested one-step upgrade from Channel 243A to Channel 243C3 and that (ii) SRC's January 17, 2001 application should be granted without being required to protect the allocation reference coordinates of LP's proffered Class C3, one-step upgrade amendment. ^{12/}

Respectfully submitted,



Robert Lewis Thompson
THIEMANN AITKEN & VOHRA, LLC
908 King Street, Suite 300
Alexandria, VA 22314
(703) 836-9400
rlt4fcc@erols.com

Counsel for SRC

June 13, 2001

^{12/} This Petition is being served not only by mail but also being e-mailed this date to counsel for LP in order that it might have advance notice of Petitioner's claims prior to the deadline for LP's payment of the final installment due on its auction bid. See note 6, supra.

CERTIFICATE OF SERVICE

I, Robert Lewis Thompson, do certify that on this 13th day of June, I served copies of the foregoing "Petition for Reconsideration And/Or Clarification" on counsel of record by first class mail, postage prepaid:

Timothy Brady, Esq.
Box 71309
Newman, GA 30271-1309 *

Counsel for Liberty Productions, LP


Donald Evans, Esq.
Donelan Cleary et al
1100 New York Ave., NW #750
Washington, DC 20005 *

Stephen T. Yelverton, Esq.
601 13th Street, NW #500
Washington, DC 20005 *

Lee Peltzman, Esq.
Shainis & Peltzman, Chartered
1901 L Street, NW #290
Washington, DC 20036-3506

John I. Riffer, Esq.
Office of General Counsel
FCC -- Room 8-A660
Washington, DC 20554

Michael Wagner
Mass Media Bureau
FCC -- Room 2-A523
Washington, DC 20054


Robert Lewis Thompson

* (Sent by e-mail this date)